

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

**INTERNATIONAL UNION OF
OPERATING ENGINEERS**

from the Executive Officer's January 31, 2002
Approval of a Contract Between the State
Personnel Board and Kronick, Moskovitz,
Tiedemann & Girard for Legal Services

BOARD DECISION

PSC NO. 02-02

September 11-12, 2002

APPEARANCES: Matthew J. Gauger, Attorney, on behalf of the International Union of Operating Engineers; Bruce A. Monfross, Staff Counsel, on behalf of the State Personnel Board.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

DECISION

The International Union of Operating Engineers (IUOE) has appealed from the Executive Officer's January 31, 2002 decision approving the contract (Contract) for legal services between the State Personnel Board (SPB) and Kronick, Moskovitz, Tiedemann & Girard (Contractor). The 4-member State Personnel Board (Board) finds that SPB has adequately shown that the Contract is authorized under Government Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision approving the Contract.

BACKGROUND

The Contract calls for the Contractor to provide, on a request basis, legal representation to SPB in connection with the case of State Personnel Board v. Department of Personnel Administration et al., Superior Court Case No. 01CS00109 (SPB v. DPA/IUOE) and other related cases. IUOE has challenged the Contract, asserting that the contracted services can be provided adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated September 18, IUOE asked SPB to review the Contract for compliance with Government Code § 19130(b). By memorandum dated December 11, 2001, SPB submitted its response to IUOE's request. By letter dated January 11, 2002, IUOE submitted its reply to SPB's response.

The Executive Officer issued his decision approving the Contract on January 31, 2002.

By letter dated March 1, 2002, IUOE filed an appeal to the Board from the Executive Officer's approval of the Contract. SPB filed its response dated April 22, 2002. IUOE filed its reply dated April 30, 2002.

The Board has reviewed the record, including the written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.¹

¹ in its submissions to the Board, IUOE has not objected to the Board's jurisdiction to review and issue a decision with respect to a contract that was entered into by SPB. In addition, IUOE has not objected to the SPB Executive Officer's initial review of the Contract for compliance with Government Code § 19130(b).

ISSUES

The following issues are before the Board for consideration:

- (1) Is the Contract authorized by Government Code § 19130(b)(7)?
- (2) Is the Contract authorized by Government Code § 19130(b)(10)?

DISCUSSION

Government Code § 19130(b)(7)

SPB asserts that the Contract is authorized under Government Code § 19130(b)(7), which permits a state agency to enter into a personal services contract when:

State agencies need private counsel because a conflict of interest on the part of the Attorney General's office prevents it from representing the agency without compromising its position. These contracts shall require the written consent of the Attorney General, pursuant to Section 11040.²

² Government Code § 11040 provides :

- (a) This article does not affect the right of any state agency or employee to employ counsel in any matter of the state, after first having obtained the written consent of the Attorney General.
- (b) It is the intent of the Legislature that overall efficiency and economy in state government be enhanced by employment of the Attorney General as counsel for the representation of state agencies and employees in judicial and other proceedings. The Legislature finds that it is in the best interests of the people of the State of California that the Attorney General be provided with the resources needed to develop and maintain the Attorney General's capability to provide competent legal representation of state agencies and employees in any judicial proceeding.
- (c) Except with respect to employment by the state officers and agencies specified by title or name in Section 11041 or when specifically waived by statute other than Section 11041, the written consent of the Attorney General is required prior to employment of counsel for representation of any state agency or employee in any judicial proceeding.

In 1999, the Association of California State Attorneys and Administrative Law Judges (ACSA) filed a petition for writ of mandate in the Sacramento County Superior Court in Association of California State Attorneys and Administrative Law Judges v. Department of Personnel Administration et al. (ACSA v. DPA), Case No. 99CS00260. In that case, ACSA challenged certain provisions of a Memorandum of Understanding (MOU) between the Department of Personnel Administration (DPA) and Bargaining Unit 8 that permitted a Board of Adjustment and private arbitrators, instead of SPB, to review adverse actions taken against state civil service employees. SPB was granted leave to file an *amicus curiae* brief in that action to address certain constitutional issues raised by the Superior Court. The Superior Court grant ACSA's writ petition in ACSA v. DPA based upon the constitutional issues addressed by SPB in its *amicus curiae* brief.

The respondents in ACSA v. DPA appealed the Superior Court's decision to the Third District Court of Appeal, Case No. 3 Civil CO34943. The Attorney General (AG) filed an *amicus curiae* brief with the Third District Court of Appeal in that matter. In that *amicus curiae* brief, the AG specifically opposed ACSA's and SPB's position in that case.

On or about January 25, 2001, SPB filed a petition for writ of mandate in SPB v. DPA/IUOE, challenging certain provisions of MOUs between DPA and Bargaining Units 11, 12 and 13, which permit Boards of Adjustment and private arbitrators, instead of SPB, to review adverse actions taken against state civil service employees. The constitutional issues raised by SPB in SPB v. DPA/IUOE are the same constitutional issues that are currently pending before the Third District Court of Appeal in ACSA v. DPA.

During the course of the litigation in SPB v. DPA/IUOE, IUOE served voluminous requests for written discovery and oral depositions. In addition, IUOE filed an unfair labor practices charge against SPB with the Public Employment Relations Board (PERB), which issued a complaint. SPB determined that it did not have sufficient in-house staff to respond to the numerous discovery requests and the unfair labor practice charge. Because the AG had already made an appearance in opposition to ACSA's and SPB's position in ACSA v. DPA, SPB requested permission from the Office of the Attorney General (OAG) to employ legal counsel other than the AG to assist in representing SPB in SPB v. DPA/IUOE.

By letter dated June 19, 2001, Pamela Smith-Steward, the Chief Assistant Attorney General, on behalf of the AG, notified SPB that the OAG had a conflict that prevented it from representing SPB in SPB v. DPA/IUOE and granted SPB written consent, pursuant to Government Code § 11040, to employ counsel other than the AG as follows:

On behalf of the California State Personnel Board ("SPB"), you have requested this office's consent to employ private counsel to represent SPB in the above referenced lawsuit [SPB v. DPA/IUOE] as well as in related litigation where the underlying issue is whether Article III of the State Constitution precludes the Department of Personnel Administration ("DPA") from entering into Memoranda of Understanding which provide for the review of disciplinary actions by entities other than SPB.

Our office has filed an amicus brief in the case of *Association of State Attorneys and Administrative Law Judges v. Department of Personnel Administration, et al.*, Case No. 99CS00260 in support of a position

contrary to that of SPB's position on the constitutional limitations of DPA's authority to enter into such agreements. Therefore, there is a clear conflict which prevents our representation of SPB on this issue in the above-referenced case and other related cases raising the same issue.

Due to the foregoing circumstances, consent to the employment of counsel other than the Attorney General is hereby granted pursuant to Government Code section 11040....

After receiving the OAG's consent under Government Code § 11040, SPB entered into the Contract.

SPB asserts that the OAG's determination that it had a conflict representing SPB in SPB v. DPA/IUOE and its written consent to employ outside counsel under Government Code § 11040 satisfy the requirements of Government Code § 19130(b)(7).

IUOE has raised a number of arguments in opposition to SPB's position. First, IUOE asserts that the Chief Assistant Attorney General's June 19, 2001 letter does not establish sufficient authorization for contracting because the letter was drafted and signed by a low level functionary, and not a person of decision-making power in the OAG.

IUOE has not presented any information to the Board to indicate that the Chief Assistant Attorney General is just a low level functionary who did not have the authority to make the determinations set forth in the June 19, 2001 letter. From every indication on the face of the June 19, 2001 letter, the Chief Assistant Attorney General was writing on behalf of the AG. In addition, given the typical duties of the position of Chief

Assistant Attorney General as set forth in its class specification³, it appears that making the determinations set forth within the June 19, 2001 letter were well within the authority of a person occupying that position. Finally, it appears that the determination set forth in the June 19, 2001 letter reflected the position of the AG. In a letter dated August 8, 2001, the AG, Bill Lockyer, wrote to counsel for IUOE as follows:

...I understand that on July 23, 2001, Supervising Deputy Attorney General Louis Mauro had an opportunity to talk with you about your concerns relating to the above-referenced actions⁴ and that he reassured you regarding this office's continued support for the Board of Adjustment process.

As Mr. Mauro said in his phone conversation with you, this office has not taken any position in opposition to the Board of Adjustment process, and there are no plans to do so....

Given these factors, there is no evidence to suggest that the Chief Assistant Attorney General was not speaking for the AG when she issued the letter dated June 19, 2001, which stated that there was a "clear conflict" which prevented the OAG from representing SPB in SPB v. DPA/IUOE and granted the OAG's consent for SPB to retain outside counsel.

Next, IUOE asserts that the Chief Assistant Attorney General's statement that the AG has a conflict representing SPB is wrong; the AG has merely expressed, as a matter of opinion on a political and social policy, that traditional arbitration is an acceptable manner by which to resolve labor disputes, including, but not limited to, state employee discipline.⁵ According to IUOE, this expression of a political viewpoint by the AG does not create an attorney's legal conflict.

³ The Board takes official notice of its class specifications. The class specification for Chief Assistant Attorney General states that the typical tasks of that class include:

Assists the Attorney General and the Chief Deputy Attorney General in formulating policies; directs and coordinates the legal work, including litigation, of one of the divisions of the Department; assists in coordinating activities with other divisions; reviews and gives final approval to opinions prepared for issuance by the Attorney General; supervises preparation of the divisional budget and assists in presenting it to the Legislature; directs informational activities within the agency such as preparation of status reports and office manuals and the conduct of staff meetings; recommends and effects changes in personnel assignments; secures, trains, and evaluates the performance of personnel and takes or recommends appropriate action; acts for the Attorney General, as assigned, in meetings with legislators, department heads, court officials, and others; is responsible for maintaining good relations with the public, the press, and various civic organizations.

⁴ IUOE v. Department of Personnel Administration et al., Sacramento Superior Court No. 01CS00491, and IUOE v. Kathleen Connell, Los Angeles Superior Court No. BS-064819.

⁵ IUOE also asserts that Leslie Lopez, a Deputy Attorney General in the OAG, represented SPB in a series of writ proceedings concerning the validity of Board of Adjustment decisions. IUOE is incorrect; SPB did not retain Ms. Lopez or the OAG to represent it in those proceedings.

The California Supreme Court has recognized that the OAG has broad latitude to determine for itself whether it has an actual or potential conflict representing the interests of state agency clients and, if it perceives that such a conflict exists or might arise in the future, to utilize Government Code § 11040 to withdraw as counsel for an agency and authorize the agency to retain outside counsel.⁶ The Board will not second-guess the OAG's own determination that its position as *amicus curiae* in ACSA v. DPA created a "clear conflict" that prevented it from representing SPB in SPB v. DPA/IUOE.

Finally, IUOE asserts that even if a conflict existed and the OAG could not represent SPB, SPB had to retain other civil service lawyers to represent it and could not contract with private counsel. In particular, IUOE asserts that SPB should have used one of its Administrative Law Judges (ALJs) to assist its staff counsel in representing SPB in SPB v. DPA/IUOE.

Before contracting with private counsel, a state agency must first determine whether there are attorneys within the state civil service who are available and able to represent the agency. But a state agency has an obligation to request that an agency other than the OAG provide legal representation only to the extent that that other agency offers such legal representation. The only agency other than the OAG that may offer the type of legal representation to other state agencies that was required in SPB v. DPA/IUOE is DPA. Since SPB was suing DPA in SPB v. DPA/IUOE, it clearly had no obligation to ask DPA for legal representation prior to contracting. SPB also had no obligation to ask any of its ALJs to represent SPB in SPB v. DPA/IUOE. The class specification for an SPB ALJ does not include legal representation of SPB in litigation as one of the duties of that position.

In sum, the Board finds that SPB has adequately shown that because of the voluminous discovery proposed by IUOE, it needed to retain counsel to assist it in litigating a constitutional issue of significance to the civil service merit system. SPB has shown that it required private counsel because a conflict of interest on the part of the OAG prevented it from representing SPB in SPB v. DPA/IUOE without compromising the OAG's position, and that SPB obtained the written consent of the OAG pursuant to Government Code § 11040 prior to contracting. The Board, therefore, finds that SPB has shown that the Contract is authorized under Government Code § 19130(b)(7).

Government Code § 19130(b)(10)

SPB asserts that the Contract is also authorized by Government Code §

19130(b)(10), which authorizes a state agency to enter into a personal services contract

⁶ See, People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 154. (The California Supreme Court stated that, under Government Code § 11040, "[t]here is no question that at such time as he believed a potential conflict existed, the Attorney General could ... properly withdraw as counsel for his state clients and authorize them to employ special counsel.")

with a private contractor when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to show that the Contract complies with Government Code § 19130(b)(10), SPB must show that the Contract meets both of its conditions: (1) the contracted services are either urgent, temporary or occasional; and (2) the purpose of those services would be frustrated by the delay in hiring civil service employees to perform them.

SPB asserts that its legal staff unexpectedly had to respond to voluminous requests for discovery and oral depositions at the same time it was forced to address the unfair labor practices charges filed by IUOE against SPB and the subsequent complaint issued by PERB. Relying upon People ex rel. Department of Fish and Game v. Attranco (Attranco), 50 Cal.App.4th 1924, 1936-7, SPB asserts that these facts show that the Contract is justified under Government Code § 19130(b)(10) because SPB had an urgent need for counsel that could not be met by the civil service in a timely fashion.

IUOE asserts that Government Code § 19130(b)(10) does not license contracting out based upon the fact that SPB's in-house counsel would have had to "work harder" to meet its legal deadlines. In previous cases under these provisions, SPB has been extremely reluctant to allow contracting out. IUOE argues that the facts in Attranco were very different from this case. That litigation case arose from an oil spill, involved 5 agencies as defendants, and went on for several years.

SPB v. DPA/IUOE lasted for less than 6 months and was brought by SPB, not against SPB.

According to IUOE, any exigency or emergency that occurred, occurred because SPB insisted on taking the case quickly to trial rather than establishing reasonable discovery timelines.

While it is true that SPB initiated the litigation in SPB v. DPA/IUOE, SPB could not reasonably have anticipated the volume of discovery propounded by IUOE at the time that litigation was filed, given that writ petition actions usually involve no discovery and ACSA v. DPA, a similar writ action, proceeded without discovery requests or pre-trial motions. In addition, SPB could not have anticipated that IUOE would file an unfair labor practice charge with PERB in response to the litigation. As a result of the extensive discovery requests, multiple motions and unfair labor practice charge filed by IUOE, SPB had an urgent need for legal assistance that could not be handled by its own in-house staff and could not be referred to either of the two agencies that ordinarily represent other state agencies in such matters: the OAG and DPA. When those issues unexpectedly arose, in order to meet the impending time deadlines, SPB had an urgent need for legal assistance that could not be fulfilled by civil service staff. SPB has, therefore, shown that the Contract is authorized by Government Code § 19130(b)(10).

CONCLUSION

The Board finds that SPB has submitted adequate information to show that the Contract is authorized by Government Code § 19130, subdivisions (b)(7) and (b)(10). The Board, therefore, sustains that Executive Officer's decision approving the Contract.

STATE PERSONNEL BOARD

Ron Alvarado, President
William Elkins, Vice President

Florence Bos, Member
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on September 11-12, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[IUOE-SPB-02-02-Dec]